

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 24, 2003

**IN THE MATTER OF: A.J.H.,  
A CHILD UNDER 18 YEARS OF AGE**

**Appeal from the Juvenile Court for White County  
No. 1668 JU 623     Sam Benningfield, Judge**

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**No. M2002-01568-COA-R3-JV - Filed March 14, 2003**

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The trial court terminated the parental rights of the father of a three-year-old boy on several statutory grounds, including abandonment and failure to remedy conditions that prevent him from providing a safe home for the child. *See* Tenn. Code Ann. § 36-1-113(g). We affirm the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court  
Affirmed and Remanded**

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which WILLIAM C. KOCH, JR. and WILLIAM B. CAIN, JJ., joined.

R. Steven Randolph, Cookeville, Tennessee, for the appellant, B.B.

Paul G. Summers, Attorney General and Reporter; Douglas Earl Dimond, Assistant Attorney General, for the appellee, Department of Children's Services.

**OPINION**

**I. A QUESTION OF PATERNITY**

A.J.H. was born on December 22, 1998. His mother, J.H., was unsure of the identity of the father, but believed it was either the appellant, B.B., with whom she had been living at the time of conception, another man she had a relationship with at about the same time, or a third man, who had raped her. No father is listed on the birth certificate.

On June 29, 1999, the Department of Children's Services (DCS) filed a petition in the Juvenile Court of White County, Tennessee, for temporary custody of A.J.H. The petition alleged that two days earlier, J.H. had left the six-month-old with someone she had known for only a couple of weeks; that the baby was very ill, and was taken to the emergency room; that because the mother's whereabouts were unknown the hospital contacted the maternal grandfather to obtain his permission

to have the child admitted; and that the maternal grandfather declared his intention to remove the child from the hospital, against medical advice.

On the basis of the petition, the court granted DCS a protective custody order, placing the child with the Department for foster care. At a follow-up hearing at which the mother was present, the earlier decision was affirmed, and a Guardian ad Litem was appointed for the child. DCS worked with the mother to create a Permanency Plan, but because of the mother's drug problems, she was unable to fully comply with the plan. B.B. had no involvement with the child, and was not included in the permanency plan. He later claimed that he did not know he was the father.

## **II. TERMINATION PROCEEDINGS**

On November 9, 2000, the Department filed a petition to terminate the parental rights of both J.H. and B.B. The petition refers to B.B. as "Alleged Father, Present Whereabouts Unknown," and states that there was no claim of paternity of A.J.H. in the Putative Father Registry, and that no one had held himself out as the father of the child. B.B. was eventually served at the Southeastern Tennessee State Regional Penitentiary. He had been incarcerated since December 26, 2000.

The court appointed attorneys to represent both parents. DCS moved against J.H. and B.B. in both separate and joint proceedings. After a hearing on June 27, 2001, the court found that the Department had proven the grounds for termination against J.H., but because she had made some progress, it reserved the question of best interest, and ordered the Department to continue with the permanency plan.

DCS attempted to place A.J.H. in the mother's home for a trial home visit, but it did not work out. J.H. told the DCS Team Leader that if she knew it would be so hard to care for A.J.H., she would not have sought custody of him. After seventeen days, she voluntarily terminated the trial home visit and placed the child back in foster care. At a hearing on November 13, 2001, J.H. announced to the court that she consented to her parental rights being terminated, and the court issued a Final Decree of Guardianship to that effect.

Meanwhile, B.B. had asked the court to order DNA tests. The tests showed a 99.72% probability that he was the father of A.J.H. On October 11, 2001, B.B. filed a petition to establish parentage of A.J.H., and for visitation. The petition was heard five days later. The court entered an order establishing paternity between B.B. and the minor child on November 13, 2001.

The hearing on the termination of B.B.'s parental rights was conducted on March 13, 2002. Nine witnesses testified including J.H., three DCS employees, an employee of the Department of Correction, B.B.'s wife, his mother, his former stepfather, and B.B. himself.<sup>1</sup>

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<sup>1</sup> B.B. was able to appear at this and other hearings by virtue of transport orders directing the White County Sheriff to transport him from prison to the courthouse. We note that there are five such transport orders in the record.

B.B. testified that in November of 2000, he was sentenced to four years imprisonment on two counts of felony burglary and theft. His wife was sentenced to three years on two counts of theft arising out of the same incident, but she was given probation. B.B. also admitted to prior convictions for domestic assault, simple assault, public intoxication, and misdemeanor theft. He invoked his rights against self-incrimination when asked about an incident in prison involving a body cavity search, during which correctional officers found an ounce of marijuana in his possession.

However, B.B. also claimed that he had become a changed man since he learned that he was a father. He testified that he earned his G.E.D. in prison, improved his cabinetry skills, went to A.A. and N.A. classes, was attending parenting classes, and was determined to be a good father to A.J.H. if he ever got the chance. His wife and his mother also testified to the positive changes he had undergone.

The testimony most in dispute at trial involved B.B.'s degree of awareness, prior to the DNA tests, as to the possibility that he might be A.J.H.'s father. B.B. testified that when he asked J.H. about it, she unequivocally denied that he was the father. J.H. denied telling him that, and testified that she only told him she wasn't sure who the father was.

B.B.'s mother testified that J.H. told her several times that B.B. was not the father. Nonetheless, the mother continued to hope that A.J.H. was her grandson. B.B.'s wife testified that she and her husband frequently discussed the question. It is a fair inference from the testimony of all the witnesses that while B.B. did not know for certain that he had fathered A.J.H., he and all the members of his family believed that it was at least a possibility.

However, B.B. admitted that he didn't visit J.H. in the hospital after she gave birth, didn't help with her doctor and hospital bills, and that he never furnished any support to the child, or sent gifts, birthday cards or letters, even after he learned that he was A.J.H.'s father. It appears that any gestures of affection or kinship towards the child were made by B.B.'s mother and his wife, but never by him.

At the close of the proof, the trial judge took the matter under advisement. On December 13, 2001, the Juvenile Court filed its Final Decree of Guardianship, which terminated the rights of B.B. on the grounds of abandonment, and persistence of the conditions which led to the child being removed from the parental home, with little likelihood that those conditions could be remedied in the near future. *See* Tenn. Code Ann. § 36-1-113(g). This appeal followed.

### **III. GROUNDS FOR TERMINATION**

Parents have a constitutional right to the care and custody of their children. *O'Daniel v. Messier*, 905 S.W.2d 182 (Tenn. Ct. App. 1995); *Stanley v. Illinois*, 405 U.S. 645 (1972). Those rights are not absolute, however, and they may be terminated upon appropriate statutory grounds. Due process requires clear and convincing evidence of the existence of the grounds for termination

of the parent-child relationship. *In re Drinnon*, 776 S.W.2d 96 (Tenn. Ct. App 1988); *Santosky v. Kramer*, 455 U.S. 745 (1982).

Tennessee Code Ann. § 36-1-113 governs termination of parental rights in this state. A parent's rights may be terminated only upon “(1) a finding by the court by clear and convincing evidence that the grounds for termination o[f] parental or guardianship rights have been established, and (2) that termination of the parent's or guardian's rights is in the best interests of the child.” Tenn. Code Ann. § 36-1-113(c).

#### A. ABANDONMENT

Abandonment is one of the grounds relied upon by the trial court in this case. The termination statutes define abandonment as willfully failing to visit or willfully failing to support or make reasonable payments towards the support of the child for the four consecutive months immediately preceding the filing of the Petition to Terminate Parental Rights. Tenn. Code Ann. § 36-1-102(1)(A)(i). Where the parent is incarcerated at the time of the filing of the petition, abandonment means failure to visit or failure to support for the four consecutive months immediately preceding such incarceration. Tenn. Code Ann. § 36-1-102(1)(A)(iv).

There can be no doubt that B.B. failed to offer any support to A.J.H. during the relevant period, and that there was no visitation during that time. However, our Supreme Court has declared that for constitutional reasons, termination of parental rights on the ground of abandonment must be based on a willful or voluntary failure to act. *See Tennessee Baptist Children's Home v. Swanson*, 2 S.W.2d 180 (Tenn. 1999). B.B. argues that his failure to assume his parental responsibilities cannot be considered willful or voluntary, because J.H. denied that he was the father, and refused to allow him contact with the child.

It appears to us, however, that despite the mother's denials, he was not totally in the dark about the possibility that he might be A.J.H.'s father, nor was he powerless to take steps to resolve the question. Modern DNA testing has made it possible to establish paternity as a scientific fact, even in the face of a mother's refusal to acknowledge it. Also, DCS maintains a putative father registry, whereby an individual who believes himself to be the father of a child may register, and thereby begin to assume both the rights and responsibilities attached to that status. Tenn. Code Ann. § 36-2-209. B.B. took no action to learn the truth about his relationship to A.J.H. or to establish his rights until DCS filed its petition.

B.B. cites this court's opinion in *Menard v. Meeks*, 29 S.W.3d 870 (Tenn. Ct. App. 2000) to bolster his argument that his abandonment of the infant was involuntary. In that case, the trial court terminated the parental rights of a teenaged father on the ground of abandonment. We reversed, because the proof clearly showed that the young mother and her parents consistently rebuffed the father's efforts to visit the child and to pay support. In the present case, even if we were to find that B.B. made a genuine attempt to visit A.J.H., the evidence clearly shows that he made absolutely no

effort to offer any kind of support to the infant, not even in the form of a token gift, such as a toy, an article of clothing, or a package of disposable diapers.

B.B. also complains that DCS did not include him in its permanency plan, and that he never received any notice that he was the father of A.J.H. until he was served with the petition to terminate his rights. He also notes that the courts never ordered him to pay support. It appears to us that he is asking the State to be more protective of his rights than he himself ever tried to be. If B.B. had taken steps to establish his paternity, then DCS and the courts would have been obligated to include him in their planning for the child's future.<sup>2</sup> Since he did not, DCS could have chosen to file a petition against him to establish paternity, *see* Tenn. Code Ann. § 36-2-103, but we do not believe it was obligated to do so.

When we consider B.B.'s awareness of his possible relationship to A.J.H. and the means available to him to legally establish that relationship, we agree with the trial court that DCS has proven the grounds of abandonment by clear and convincing evidence, in accordance with the statutory definition, including the requirement that the failure to support be willful or voluntary.

## **B. FAILURE TO REMEDY**

Only one ground need to be proven in order to terminate parental rights, so long as it is coupled with an appropriate finding as to the best interest of the child. We agree with the trial court, however, that DCS has proven a second ground for termination by clear and convincing evidence. That ground is described in Tenn. Code Ann. § 36-1-113(g)(3), which reads,

(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

The record shows that A.J.H. was removed from his mother's home because the lack of a responsible adult in the home exposed him to the possibility of neglect. With a father in prison,

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<sup>2</sup>The United States Supreme Court has stated on several occasions that the parental rights of an unwed father who has assumed the responsibilities of fatherhood and come forward to participate in the rearing of his child are entitled to more protection under the due process and equal protection clauses than one who can merely show the existence of a biological link. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

whose wife is on probation, it takes no great leap of logic to conclude that such conditions still persist. Even though there was testimony in the record that B.B. has made great strides in prison to improve himself, the recent incident involving marijuana shows that there is little likelihood that the conditions that first brought A.J.H. into foster care can be remedied at an early date.

The record also shows that DCS is aware of several families that are prepared to adopt A.J.H.. Clearly, the continuation of the parental relation to B.B. diminishes the possibility that he can be placed in a home that would permanently meet his needs.

#### **IV. THE BEST INTEREST OF THE CHILD**

In Tenn. Code Ann. § 36-1-113(i), the legislature has listed some factors for the courts to consider when determining the best interest of a child:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Many, if not most, of the factors on this list support a finding that termination of B.B.'s parental rights is in the best interest of A.J.H. For example, B.B. is in prison, and there is no certainty that he will be released in the near future. He thus has failed to adjust his circumstances

to make it safe for A.J.H. to be in his home. B.B.'s history of violence and use of alcohol, and the prison marijuana smuggling incident also raise safety concerns.

Further, since B.B. has never supported A.J.H., and never visited him after the child came into state custody, no meaningful relationship has yet been established between B.B. and A.J.H. The child does not know his father at all. Under those circumstances, a change of caretakers and of physical environment is likely to cause a difficult and perhaps damaging period of adjustment for the child. We therefore think it is clearly in A.J.H.'s best interest for B.B.'s parental rights to be terminated.

**V.**

The judgment of the trial court is affirmed. Remand this cause to the Juvenile Court of White County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant, B.B.

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BEN H. CANTRELL, PRESIDING JUDGE, M.S.